SUPREME COURT, U. S.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 978

CARL E. RING,

Plaintiff-Petitioner,

vs.

MAYOR AND COUNCIL OF THE BOROUGH OF RUTHERFORD, NEW JERSEY, BOARD OF ADJUSTMENT OF THE BOROUGH OF RUTHERFORD, NEW JERSEY and MARTIN KRAJAC, BUILDING INSPECTOR OF THE BOROUGH OF RUTHERFORD, NEW JERSEY,

Defendants-Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION

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PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION

Petitioner, Carl E. Ring, prays that a writ of certiorari issue to review a final judgment of the Superior Court of New Jersey, Appellate Division, dated June 5, 1970, affirming a final judgment of the Superior Court, Bergen County, dated July 22, 1969, which dismissed the petitioner's complaint in the above-entitled action. The opinion of the Appellate Division, which is its mandate, is printed herein (Appendix A) and is reported in 110 N. J. Sup. Ct. Rep. P. 441.

Jurisdiction

The petitioner made due and timely application to the Supreme Court of New Jersey for certification to review the judgment of the Appellate Division. The said petition

was denied by an order of that Court dated September 24, 1970, a copy of which order is printed herein. A copy of the said petition will be filed with this petition.

The opinion of the Appellate Division, printed herein, dated June 5, 1970, is the judgment of that Court entered that day and it is the final judgment of the highest Court of New Jersey in which a judgment could be had, and it became final on September 24, 1970, the date of denial of certification by the Supreme Court of New Jersey.

The statutory provision believed to confer jurisdiction on this Court to review the judgment in question by writ of certiorari is entitled 28 U.S.C., Sec. 1257. The portion of that section pertinent to jurisdiction of this review provides as follows:

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> (3) By writ of certiorari * * * where any title, right, privilege or immunity is specially set up or claimed under the Constitution * * * of the United States."

Questions Presented for Review

Is the zoning ordinance of the Borough of Rutherford, New Jersey, to the extent that it purports to divide the residential area into districts where a dwelling can be used only for "one family" or "one housekeeping unit" and districts where a similar dwelling can be used for "two families" or "two housekeeping units," invalid and unenforceable as against property of petitioner in Rutherford on the ground that the said ordinance and its administration, by the allowance of variances, is a denial of due process and equal protection of the laws under the Fourteenth Amendment of the United States Constitution?

The Constitutional Provisions and Ordinance Relied Upon

Petitioner relies on the Fourteenth Amendment of the United States Constitution, and particularly the Due Process and Equal Protection Clauses.

One copy of the zoning ordinance of Rutherford is filed with this petition and pertinent sections are printed here in Appendix C.

Statement of the Case

The petitioner is the owner of a two and one-half story wood frame dwelling at 97 Ridge Road in Rutherford, built about 1904 or 1905, on a lot 100 ft. x 130 ft.

The ground floor contains a large hall, two bedrooms, a bath, a living room, sunporch and kitchen, and is occupied by John E. Ring, who has lived there for twenty-five years with his mother, until her death during these proceedings.

The second floor contains five bedrooms, two baths and a hall, and is reached by two flights of stairs. It has been vacant for five years.

In 1963 petitioner sought a permit to use the premises for two families, with minor changes on the second floor. The plans as such were approved, but a permit was refused because the premises are located in a zone limited to one-family dwellings and in which two-family occupancy is prohibited.

The Complaint in this action sought a judgment declaring the zoning ordinance invalid, to the extent that it prohibited two-family houses or two-family use of a house on petitioner's lot. Before bringing this action to declare the zoning ordinance invalid under the Due Process and Equal Protection Clauses of the Fourteenth Amendment, petitioner made a second application for a variance to

convert the premises for two-family use, in order to avoid a defense that he had not exhausted all administrative remedies. The variance was denied by resolution of the Board of Adjustment of the Borough of Rutherford, dated November 12, 1968.

The Complaint herein had a second cause of action, to declare the denial of the variance also invalid as arbitrary and discriminating in violation of the Due Process and Equal Protection Clauses of the Fourteenth Amendment of the United States Constitution.

After hearing, the Superior Court, Bergen County, held the zoning ordinance in the respects complained of valid and constitutional, affirmed the denial of a variance and dismissed the Complaint by a judgment, July 23, 1969. The Appellate Division affirmed the Superior Court in all respects by an opinion and judgment dated June 5, 1970.

The Supreme Court of New Jersey denied a petition for certification September 24, 1970.

Statement of Evidence and Facts

The petitioner alleged the following facts, which were admitted or proved, as appears in petitioner's brief and appendix in the Appellate Division, nine copies of which are filed with this petition:

Rutherford, New Jersey, eight miles from New York, has a population of about 21,000 and occupies about a square mile. It is zoned for one-family houses, two-family houses, apartments, business, industry and a university. Of 220 blocks, about 180 are residential. Of these, approximately 160 are zoned for one-family use and approximately 20, scattered throughout the Borough, are zoned for two-family use.

There are approximately 3,700 single family dwellings and 1,342 two-family dwelling units, so that 25% of the

population live in two-family houses (15a). Only 220 of the two-family units are in the Residence No. 2 two-family zone, while over 700 are in the Residence No. 1 one-family zone (Master Plan, p. 42).

Zoning first came to Rutherford in 1922, at which time it is generally conceded most of the houses were built for one-family use, and after the depression of 1929 several hundred were converted to two-family use, with and without the consent of the authorities.

The Borough is divided into five school districts, all of which have one and two-family houses. The older Sylvan district, in which petitioner's house is located, includes about 30 blocks zoned for one-family use and two blocks zoned for two-family use. There are in this district 525 single family houses and 422 two-family units, nearly 300 of which are in the blocks zoned for one-family houses. Thus, the designation of one-family district and two-family district bears no relation to the real situation. In the block in which petitioner's house is located, there are fourteen houses, six of which are two-family houses, three of which face on Ridge Road.

The petitioner was required to give notice of the application for a variance to the owners of twenty-seven properties within 200 feet. Eighteen were one-family dwellings and nine were two-family dwellings, housing eighteen families, so that 50% of the people within 200 feet live in two-family dwellings, all in a zone restricted to one-family dwellings.

In the last twenty years the Board of Adjustment has allowed sixty variances to convert one-family use to two-family use within a few blocks of petitioner's residence. Under New Jersey law, before a variance can be allowed, the Board must find that (NJS 40:55-39):

> "Such relief can be granted without substantial detriment to the public good and will not substantially

impair the intent and purpose of the zone plan and zoning ordinance."

The granting of sixty variances means sixty findings that the conversion can be granted without detriment to the public welfare.

The Master Plan states (p. 13):

> "*Sylvan*—This neighborhood most closely resembles the Washington neighborhood due to the relative advanced age of the homes and high ratio of two-family and multifamily dwellings to single family homes."

One copy of the Rutherford Master Plan, which was admitted in evidence to show "current physical make-up" conditions in the community and "for statistical purposes only," is filed with this petition.

Ninety percent of the dwellings, both one-family and two-family, in Rutherford are on 50 foot lots, the petitioner has a lot 100 feet front and 130 feet deep.

The brief of the counsel for the Board of Adjustment in the Appellate Division states (p. 9):

> "The minimum lot size is 50 feet by 100 feet and the evidence discloses that by the removal of an open porch, the plaintiff has an additional lot available for subdivision and resale."

However, petitioner desires to use his house and vacant lot for two-family dwellings.

How the Federal Questions Were Raised Before the Board of Adjustment

Prior to the hearing the petitioner mailed a written memorandum to each member of the Board of Adjustment, citing U. S. Supreme Court cases and setting forth the

petitioner's claim of the right to a variance under the Equal Protection Clause, in view of the many two-family houses within the district. At the hearing a member of the Board stated that the members were not lawyers and did not understand such matters. No record was made and no rulings were made by the Board on constitutionality, an issue which the Appellate Division later said was:

> "not raised before the Board nor within its jurisdiction."

In the Trial Court

The original Complaint set forth in the first cause of action, the foregoing statement and facts and alleged in Paragraph 42:

> "In view of the foregoing, the said ordinance of Rutherford, insofar as it purports to limit the use of dwellings in a Residence Number 1 District to one family or one housekeeping unit, is invalid as a violation of the Due Process and Equal Protection Clauses of the Fourteenth Amendment of the Constitution of the United States."

In the second cause of action, the same and additional facts were set forth, and it was alleged in Paragraph 64 that the denial of a variance to use the house for two families was:

> "a violation of the property rights of the plaintiff under the Due Process and Equal Protection Clauses of the Fourteenth Amendment."

The trial court concluded:

> "I certainly don't find the evidence sufficient to condemn the zoning ordinance as unconstitutional as to the whole district or even as applied to this one property, and I cannot say that the Board of Adjustment

was unreasonable in refusing to recommend a variance and dismiss the action."

The trial court's judgment and opinion are printed in the petitioner's brief and appendix in the Appellate Division, nine copies of which are filed with this petition.

On Appeal

The following questions were presented to the Appellate Division:

1. Is the division of the Rutherford residential area into one-family and two-family zone districts, where both districts are more or less riddled substantially with both one-family and two-family houses, a denial of due process and equal protection under the Fourteenth Amendment?

2. Does the allowance of sixty or more variances for two-family use in the one-family zone since the passing of the ordinance invalidate the ordinance under the Fourteenth Amendment, in view of the doctrine of *Wilson* v. *Mountainside*, 42 N. J. 426-443 (1963)?

3. Is the denial of a variance to use an old large one-family house for two families, where the same reasons and circumstances urged in support thereof were relied upon by the Board of Adjustment in allowing sixty or more variances in the past, an arbitrary and unreasonable discrimination invalid under the Due Process and Equal Protection Clauses of the Fourteenth Amendment?

The Appellate Division affirmed the judgment of the lower court in all respects. Its opinion, which is its judgment, is printed herein.

The same questions and the same arguments of lack of due process and the denial of equal protection were submitted in the petition for certification to the Supreme Court

of New Jersey, which was denied by order of that court September 24, 1970, a copy of which is printed herein.

One copy of the petition to the Supreme Court of New Jersey is filed with this petition.

Rulings of the Appellate Division

The Appellate Division stated the petitioner's claims on appeal to be:

> "(1) the denial of plaintiff's requested variance was arbitrary, capricious and unreasonable,"

and:

> "(2) the residential districts in the borough, as they now exist, are so riddled with nonconforming uses as both to render the denial of his application a deprivation of equal protection of the laws and to invalidate the underlying zoning ordinance."

The Appellate Division answered the first claim with the statement that the denial of the variance by the zoning board:

> "is presumptively correct," and was "not arbitrtary"

yet there are nearly 700 two-family houses in the area.

On this second point, the Appellate Division pointed out that there were some neighboring blocks in which there was no discrimination, and in other nearby blocks:

> "The combination of pre-existing uses and grants for two-family housing variances have virtually destroyed the integrity of the single-family zoned planning as to that area of the district."

It also acknowledged sixty variances in the neighborhood but stated there had not been a variance allowed on Ridge

Road. However there are some fifteen two-family houses on Ridge Road (see map, Appendix D).

The Appellate Division relied on:

> "the presumption of validity that attaches to a zoning ordinance,"

and after reciting the various discriminations held:

> "It does not follow, however, that the validity of the entire single family concept of the zoning ordinance must be condemned in toto or as regards plaintiff's property • • •."

The court articulated no justification for the restrictive use of the police power or the continued allowance of such discrimination. Since the Board of Adjustment and the municipal government are composed of laymen, a presumption of validity can have no probative force on constitutional questions, particularly since conditions have so changed since the ordinance was adopted in 1922.

> "Only by sifting facts and weighing circumstances can we determine whether the reach of the Fourteenth Amendment extends to a particular case,"
>
> *Evans* v. *Newton*, 382 U. S. 296.

The Appellate Division made no ruling on the constitutional question of denial of equal protection with respect to denial of the variance, probably because of the rule that the court is bound by the record of the Board in reviewing the denial.

The rule is true only as to administrative matters, which the Board alone can decide.

Since petitioner cannot raise the constitutional issue before the Board, due process requires that the court decide the constitutional issue on the record *de novo* in the court relating to the denial of the variance.

Reasons for Granting the Writ

The constitutional questions of zoning raised herein are of paramount importance.

The particular question of whether or not there can be separate zones in a residential area for one and two-family houses has never been decided by this court. In the leading case of *Euclid* v. *Ambler*, 275 U. S. 365 (1926), this court spoke for the first time on zoning and laid down fundamental zoning principles, particularly that apartments, business and industry could be excluded from a residential area:

> "to reduce the congestion, disorder and dangers which would often inhere in the unregulated municipal development."

In that case, there was a U-1 and a U-2 district for one and two-family houses, similar to that in Rutherford, but this court deliberately refrained from deciding the validity of that classification, saying (p. 385):

> "It is also unnecessary to consider the effect of the restrictions in respect to U-1 districts, since none of appellee's land falls within that class."

The questions of due process and denial of equal protection have been decided in a way probably not in accord with the applicable decisions of this court.

The petitioner cited and relied on pertinent opinions of this court (see Brief in Appellate Division). Not a single case of this court was cited or answered in the brief of either defendant, nor in either opinion of the courts below.

In New Jersey there are more than 500 municipalities, each having its own municipal government and zoning laws. In Bergen County alone, on the west bank of the Hudson, an area comparable to that of New York City,

there are 70 such municipalities and zoning ordinances, resulting in various inequalities and denials of due process and equal protection.

In many, as in Rutherford, there are one-family and two-family districts which are not designed to reduce "congestion, disorder and dangers," but are to segregate and restrict the less affluent tenants to certain areas as less desirable people, or force them to live in other municipalities.

Former Community Affairs Commissioner Ylvisaker of New Jersey, in discussing proposed legislation by which the state should move in and take over zoning, recently stated:

> "A suburban entity with zoning powers in the hands of people who are going to maximize their economic position by the present ground rules is one of the dangerous things going on in our system."

The Newark Sunday News, October 18, 1970, reported that Gov. Cahill of New Jersey hopes to recommend legislation that could help reduce what he calls:

> "the state's 'acute housing shortage' for the thousands of low and middle income residents with no place to go because of high housing costs,"

and is thinking in terms of:

> "somehow persuading suburban communities to ease their zoning codes to allow construction of multi-family dwellings,"

and is waiting for an inventory to tell him:

> "which towns by zoning have restricted construction of multi-family dwellings."

He points out that the state will require 1,110,000 new housing units by 1980 to meet its housing problem.

Adjacent to Rutherford, there are many thousands of acres of swamp land, which the state and private industry are proceeding to develop, and which it is estimated will create some 300,000 jobs in the future. Rutherford has many acres of such swamp land zoned for industry, which it is hoped will bring industry, jobs and taxes to Rutherford, but any such new people and their children are zoned out of Rutherford.

The Rutherford Master Plan, approved 1966 (p. 56) states:

> "During the 1970's and 1980's, however, the population (22,000) will decline slowly and level off at 21,000 around 1990, which is the end of the effective life of this Plan. The decline in population during the 1970's and 1980's will occur only if the proposals of the master Plan are carried out."

The Plan states (p. 42):

> "Any further conversions to two-family dwellings or rooming houses in these areas should be stopped through the zoning ordinance."

This court suggested in *Euclid* v. *Ambler* (p. 390), that if the municipal policy is inconsistent with the general public welfare, the state policy must prevail.

The brief of the counsel for the Borough of Rutherford states (p. 5) that for every one of the sixty variances allowed in the last twenty-two years:

> "Many, many more were denied."

This shows the arbitrary administration of the zoning law and that many, many others are being denied the rightful use of their property by a zoning ordinance of questionable constitutionality.

The Rutherford Ordinance Is to Segregate People, Not Buildings, and There Is No Basis for Classification

Zoning implies districts and a residential district concerns buildings and people. The residence No. 1 and No. 2 district regulations for the height and bulk of buildings, the building area, the yards, front, side and back, garages and subdivision are the same verbatim.

The regulations in each district provide that a doctor, dentist, lawyer, engineer, etc., can have his office in his dwelling providing the floor area does not exceed fifty percent of the first floor area in dwelling units having more than one floor, or fifty percent of the floor area of a dwelling unit in a multiple-family residence building.

Each district also allows buildings for lodges, veterans organizations, municipal buildings, schools, libraries, greenhouses and even allows pigs, sheep, goats, horses and cattle, provided the lot is at least one acre and within an enclosure fifty feet from each plot line.

Thus, the physical characteristics of the buildings and all the uses but one are the same in both districts. Regulations differ only in that residence No. 2 district allows a dwelling to be used:

> "detached or semi-detached for not more than two families nor more than two housekeeping units."

A definition of a detached two-family dwelling is found in the *Euclid* case (p. 382), which states:

> "A two-family dwelling consists of a basement and not less than four living rooms and a bathroom for each family; and is further described as a detached dwelling for the occupation of two families, one having its principal living rooms on the first floor and the other on the second floor."

Substantially, all of more than 1,300 two-family units in Rutherford meet this description and were converted from one-family use after the depression of 1929.

A semi-detached dwelling is defined in the ordinance as two houses built at the same time adjacent to each other, with a common vertical partition wall between them. They must have the same unitary physical dimensions, minimum lot areas, front and side yards as all other houses, which requirements are the same for both districts. This raises no issue because if petitioner's house is used for two families, it will be "detached."

There is a more or less equal division of one-family and two-family houses dispersed in each district in the older part of the town (see map herein, Appendix D), where petitioner's land is located.

Over 700 of the two-family units are in the so-called one-family zone (Master Plan p. 43), so that in reality there is no definite area that can be called one-family or two-family. And there is no basis for classification so far as buildings are concerned because they are all substantially the same.

The ordinance does not define "family" or "housekeeping unit." They are vague and indefinite terms and show that the purpose of the ordinance is not to regulate land and buildings but to control, regulate and segregate people in accordance with their relations to one another.

Segregation of people or any attempt to classify them as to where or how they can live is prohibited by the Equal Protection Clause.

Rinaldi v. *Yeager*, 384 U. S. 305;
Baxstrom v. *Herold*, 383 U. S. 107;
McLaughlin v. *State of Florida*, 379 U. S. 184;
Carrington v. *Rush*, 380 U. S. 89.

The Master Plan itself negates any justification for the separate districts and shows that the classification is pure arbitrary fiat.

It states (p. 44):

> "These older areas should be encouraged to bring up their general appearance and value. The most effective method of upgrading these areas, we believe, is through redevelopment of existing uses with new two-family dwellings or by converting and remodeling existing two-family and single family dwellings. In many two-family areas, wide streets and tall shade trees make distinguishing them from single family areas almost impossible. The many older people who own these dwellings will be better able to support themselves and keep up the appearance of their properties through the rental of one dwelling unit."

The Ordinance Bears No Relation to Public Welfare and Is Invalid

The declared legislative purposes of zoning in New Jersey, NJS 40:55-32, for which municipalities are authorized to zone, are as follows:

> "to lessen congestion in the streets; secure safety from fire, flood panic and other dangers; promote health, morals or the general welfare; provide adequate light and air; prevent the overcrowding of population. Such regulations shall be made with reasonable consideration, among other things, to the character of the district and its peculiar suitability for particular uses, and with a view of conserving the value of property and encouraging the most appropriate use of land throughout such municipality."

The brief of the counsel for the Board of Adjustment in the Appellate Division quoted that statute and said (p. 8):

> "Clearly, the proposed change from a one-family house to a two-family dwelling does not involve nor even enhance any of these as special reasons."

Likewise, restricting a district to one-family houses, or denying the use or conversion of a one-family house to the use of two families, bears no relation to any of these legislative purposes.

The number of residents in either case is limited only by the capacity of the building and its kitchen, sanitary and other facilities. And whether they are all members of one family or one housekeeping unit is personal and bears no relation to any of the legislative purposes for which zoning is authorized.

With seven bedrooms and three baths, petitioner could have ten or twelve occupants constituting one housekeeping unit within the terms of the Code. But if he rents the second floor to a man and wife of another family who do their own separate housekeeping, the Code is violated, and the petitioner and the tenants are subject to a fine of $200 and 90 days imprisonment in the county jail for each and every day that such violation continues.

A law which makes the lack of family relation between an upstairs and a downstairs tenant the only basis for a criminal prosecution is contrary to public welfare, and has no more validity under the United States Constitution than:

> "a state law which makes the color of a person's skin the test of whether his conduct is a criminal offense."

McLaughlin v. *State of Florida*, 379 U. S. 184.

History of Pertinent Zoning in New Jersey

The Legislature of New Jersey first authorized municipal zoning by Chapter 240 of the Laws of 1920.

The Court of Errors and Appeals, then the highest court in New Jersey, upheld the principle of zoning in *Cliffside Park Realty Co.* v. *Cliffside,* 96 N.J.L. 278 in 1921:

> "as an exercise of the police power to promote the public health, safety and general welfare."

Invalidity of the Rutherford Ordinance Under *Vernon* v. *Town of Westfield,* 98 N.J.L. 600

In this case, in 1923, the owner of a three-story brick residence was denied its use by two families under an ordinance similar to that of Rutherford. The old Supreme Court held that the power to regulate the use of buildings:

> "for the purpose of promoting the public health, safety and general welfare * * * is a limited one, and does not authorize municipalities to restrict the use of residential properties, unless such restriction is reasonably necessary for the carrying out of the declared legislative purpose."

The Court found the ordinance invalid because it bore no relation to public health or welfare, saying:

> "It operates upon every residence within the prescribed district without regard to its size, sanitary appliances or conveniences. It permits occupancy and use of a residence by a single family, no matter how large, but prohibits occupancy by two families, although the total membership of the two may be much less than that of the one. In short, its only purpose, so far as can be discovered from the language used, is to place a restriction upon the use of residential

> properties within the designated area, without any pretence that such restriction is reasonably necessary for the public health and safety."

This case was relied upon in the briefs of petitioner in both courts below and in the petition to the New Jersey Supreme Court. It was not answered nor referred to in any of the briefs of the defendants nor in the opinions of the courts below.

In the same year, 1923, the Old Supreme Court in *Ignaciumas* v. *Risley*, 98 N.J.L. 712, held that a store could not be excluded from a residential area, and that the statute authorizing the ordinance was invalid because:

> "It was violative of the rights of private property guaranteed by the federal and state constitutions."

This case was followed by many such restricted cases in New Jersey, and was cited in *Euclid* v. *Ambler* (*supra*), in 1926, among a list of cases which unduly restricted the legislative zoning power.

The Court of Errors and Appeals affirmed the result in 99 N.J.L. 389 (1924), but rejected the holding of the lower court that the enabling statute was invalid. It held that the legislation authorizing municipal zoning was valid:

> "to promote the public health, safety and general welfare,"

but decided the case on the narrow ground that the particular building, under the circumstances, would not constitute a menace to the health and safety of the people, and should be allowed in that case. Unfortunately, the affirmance was reported under the title of *State* v. *Nutley*, and apparently went unnoticed.

After the *Euclid* case (1926), the Court of Errors and Appeals in *Oxford* v. *City of Orange*, 103 N.J.L. 355

(1927), cited the *Euclid* case, which provided that apartments could be excluded from a residential area, but relied on a quotation from that opinion (p. 387):

> "It is true that when, if ever, the provisions set forth in the ordinance in tedious and minute detail, come to be concretely applied to particular premises, including those of the appellee, or to particular conditions, or to be considered in connection with specific complaints, some of them, or even many of them, may be found to be *clearly arbitrary and unreasonable.*" (emphasis ours)

and allowed an apartment house prohibited by a zoning ordinance on the ground that there was no evidence that its presence:

> "would constitute a menace to the health, safety and welfare of the public."

This has since been done hundreds of times by allowing a variance to the zoning ordinance.

Because of the conflicting interpretation of zoning power by the courts, a zoning amendment to the New Jersey State Constitution was passed October 18, 1927, as follows:

> "The Legislature may enact general laws under which municipalities other than counties, may adopt zoning ordinances limiting and restricting to specified districts and regulating therein, building and structures, according to their construction, and the nature and extent of their use, and the exercise of such authority shall be deemed to be within the police power."

Thereafter, the courts of New Jersey broadened the scope of zoning police power.

The New Jersey Supreme Court has recently stated in *Harrington* v. *Borough of Leonia*, 52 N. J. 22 (1968, p. 32):

> "Restrictions are not offensive constitutionally because when reasonable in degree and, in the judgment of the governing body, necessary to the physically harmonious growth of land use in the municipality, they serve the over-all public interest of the community."

This seems to make the judgment of the governing body the sole test of reasonableness and necessity, and considers only the:

> "physical harmonious growth of land use in the municipality."

Such doctrine is confiscatory far beyond the limits of the zoning police power and is the taking of private property for public use, which requires compensation.

Boards of Adjustment and municipal governing bodies have wide discretion and now make hundreds of exceptions resulting in spot zoning and wholesale discriminations; exceptions, which when made by the courts following legal procedures were condemned, and brought about a constitutional amendment which deems any exercise of the zoning power:

> "to be within the state police power."

The decisions, though made by laymen with little regard to rules or evidence and no jurisdiction to decide constitutional questions, are presumed to be correct. It is practically impossible to overcome such presumption as shown by the two lower court decisions in this case.

See dissenting opinion of Judges Hall and Schettino in *Vickers* v. *Tp. Com. of Glocester Tp.*, 37 N. J. 232 (1962), 252.

Unted States Supreme Court Cases

This court said in the *Euclid* case (p. 387) that zoning:

> "laws and regulations must find their justification in some aspect of the police power asserted for the public welfare."

In 1927 and 1928, this court held two zoning ordinances invalid as beyond the police power, in *Nectow* v. *City of Cambridge*, 277 U. S. 183, and *State of Washington* v. *Roberge*, 278 U. S. 116. Both of these cases confirmed and restated the rule of *Vernon* v. *Westfield* (*supra*, 1923), that zoning is a limited power, which can restrict the use of land or buildings only if it is reasonable and necessary for the general welfare of the whole community, and only for the declared legislative purposes.

These cases and principles cannot be overruled by a New Jersey constitutional amendment that any zoning ordinance shall be:

> "deemed to be within the police power."

They squarely confirm petitioner's claim that the Rutherford zoning ordinance is invalid.

Seventy-five years ago this court, in *Chicago M. St. Paul Ry.* v. *Minnesota*, 134 U. S. 418, referring to the power of a state commission to establish "reasonable" rates, said:

> "The element of 'reasonableness' both as regards the company and as regards the public is a question for judicial investigation requiring due process."

In the *Euclid* case (*supra*, p. 387), this court said:

> "The question whether the police power exists to forbid the erection of a building of a particular kind or for a particular use, like the question whether a par-

> ticular thing is a nuisance, is to be determined, not by an abstract consideration of the building or of the thing considered apart, but by considering it in connection with the circumstances and the locality."

In *Goldblatt* v. *Hempstead*, 369 U. S. 590-595, the court said concerning police power:

> "To evaluate its reasonableness we therefore need to know such things as the nature of the menace against which it will protect, the availability and effectiveness of other less drastic protective steps and the loss which appellants will suffer from the imposition of the ordinance."

This court said in the *Euclid* case (*supra*, p. 388):

> "There is no serious difference of opinion in respect to the validity of laws and regulations fixing the height of buildings within reasonable limits, the character of materials and methods of construction, and the adjoining danger of fire or collapse, the evils of overcrowding, and the like, and excluding from residential sections offensive trades, industries and structures likely to create nuisances."

Even if different structural and land area regulations for two-family houses could be justified, they could not be segregated within the residential area without showing that it was reasonable and necessary to the public welfare of the whole community. In the Rutherford ordinance, all these regulations are exactly the same for both one and two-family houses.

Conclusion

There is nothing in the Euclid opinion or any other opinion of this court which justifies segregation or classification of buildings with the same physical characteristics

merely because the occupants are not all members of the same family or housekeeping unit.

There is no evidence of, or any legislative determination that, such segregation or classification bears any relation to or is reasonably necessary to provide for the public welfare.

Any presumption of validity of the ordinance or the denial of the variance is overcome by the fact that hundreds of one and two-family dwellings stand side by side in nearly every block of the municipality, without any evidence of injury or threat of injury to the public welfare.

The purported delegation of this power to municipalities has created a system of discrimination and restrictions, repugnant to the Fourteenth Amendment, *State of Washington* v. *Roberge* (*supra*).

With taxes at about $1,000 per year, the petitioner has been denied rental, which it is fair to estimate at about $2,000 per year for the last five years.

Relief Prayed For

By reason of the foregoing, petitioner respectfully prays:

That this petition for writ of certiorari to the Superior Court of New Jersey, Appellate Division, be granted by the Supreme Court of the United States;

That the judgment of the Superior Court of New Jersey, Appellate Division, and the judgment of the Superior Court, Law Division, be reversed by an order and judgment of this court;

That this court declare the zoning ordinance of the Borough of Rutherford, New Jersey, to be invalid and unenforceable to the extent that it forbids the building or use of a dwelling for two families on the property of petitioner at 97 Ridge Road in the Borough of Rutherford; and

That a mandate to that effect issue by the Supreme Court of the United States to the Superior Court of New Jersey, Appellate Division.

Respectfully submitted,

JOSEPH B. MCGRATH,
Attorney for Petitioner,
1707 L St. N. W.,
Washington, D. C.

Filed with this petition are:

1 copy of Petition for Certification—Supreme Court of New Jersey.

1 copy of the Rutherford Zoning Ordinance.

1 copy of the Rutherford Master Plan.

9 copies of Petitioner's Brief and Appendix as filed in the Superior Court of New Jersey, Appellate Division.

1 copy of Brief of M. Harry Muser, attorney for the Borough of Rutherford, in the Appellate Division.

1 copy of Brief of Ely and Ely, attorneys for the Board of Adjustment and Building Inspector of Rutherford, in the Appellate Division.

Certified copies of the Appendix and proceedings below, as required by Rule 21.

APPENDIX A

SUPERIOR COURT OF NEW JERSEY

Appellate Division

A-2063-68

Argued April 13, 1970—Decided June 5, 1970.
Before Judges Goldmann, Lewis and Matthews.
On appeal from the Superior Court, Law Division, Bergen County.

The opinion of the court was delivered by Lewis, J. A. D.

This is an appeal by plaintiff Carl Ring from a judgment of the Law Division, in an *in lieu* proceeding, wherein the court affirmed the denial of an application for a variance and sustained the constitutionality of the zoning ordinance of defendant Borough of Rutherford.

It is claimed on appeal that (1) the denial of plaintiff's requested variance was arbitrary, capricious and unreasonable, and (2) the residential districts in the borough, as they now exist, are so riddled with nonconforming uses as both to render the denial of his application a deprivation of equal protection of the laws and to invalidate the underlying zoning ordinance.

Plaintiff is the owner of a 2½-story, 12-room frame dwelling at 97 Ridge Road in Rutherford. It was constructed in 1904 or 1905 on a lot with a 100′ frontage by a 130′ depth. The property is situate in an R-1 residential district which, under the borough zoning ordinance adopted in 1922, is zoned for one-family houses with a minimum lot size of 50′ x 100′.

In October 1968 plaintiff presented to the building inspector plans for the conversion of his house into a two-family dwelling, which apparently could be physically accomplished with minimal interior changes. A building permit was denied, solely for the reason that the property

was located in a "Residence No. 1 District, zoned for one-family houses." The next month plaintiff applied to the local board of adjustment for a variance recommendation under *N.J.S.A.* 40:55-39(d) to permit such a conversion and use. Following a hearing thereon his request was denied by unanimous resolution.

The minutes of the board reveal that Ring was the only witness in support of his application. He produced a plot plan of the premises and testified with respect to his proposed changes. He explained the need for income from the property since it was in a state of disrepair and an economic burden, and he referred to nonconforming-use properties in the immediate area. A letter from a nearby resident on Ridge Road, stating that he had no objections to the desired conversion, was received in evidence. Two neighboring property owners appeared in opposition to the application and testified in substance that the granting of such a variance would depreciate property values and would be a neighborhood detriment.

The factual findings of the board are embraced in its resolution of November 12, 1968 which can be summarized thusly: (a) plaintiff's house is located in a prime residential area of the community; (b) the four present nonconforming two-family residences on Ridge Road existed prior to the zoning requirements; (c) to grant the requested variance would substantially impair the zone plan and depreciate property values; (d) no specific reasons for recommending the variance were shown except alleged economic hardship which was insufficient to support the application; (e) the relief requested could not be granted without substantial detriment to the public good and without substantially impairing the intent and purpose of the borough zoning ordinance, and (f) a similar request was made by plaintiff in 1964 which was denied for the same reasons.

The Law Division, after reviewing the record of those proceedings, held that the board did not act unreasonable and that its findings and conclusions were "sufficient as a matter of law to support the denial of the variance." We note that there was no evidence before the board in serious conflict with its findings.

It is well settled that an applicant is not entitled to a variance in order to effectuate the most profitable use of his property, at least so long as permissible uses are feasible. *Koslow* v. *Municipal Council of Wayne Tp.*, 52 *N. J.*, 441, 452 (1968); *Bern* v. *Fair Lawn*, 65 *N. J. Super.*, 435 450 (App. Div. 1961). In order to maintain the fidelity of the general zoning scheme, a variant use is permitted only in an exceptional case where the justification is clear. See *Grundlehner* v. *Dangler*, 29 *N. J.* 256, 271 (1959). Accord, *Sitgreaves* v. *Board of Adjustment, Nutley*, 136 *N.J.L.* 21 (Sup. Ct. 1947). Furthermore, it is fundamental that a determination of a zoning board is presumptively correct, and the property owner has the burden of proof in establishing a cause for relief. *Masterson* v. *Christopher Diner, Inc.*, 85 *N. J. Super.*, 267, 273 (App. Div. 1964), certif. den. 44 *N. J.* 406 (1965).

Here, from the evidence before the local agency, it cannot fairly be said that the board's refusal to recommend a variance was unsupported by the record or that its action was in any way unreasonable, capricious or arbitrary. Accordingly, the affirmatory decision of the Law Division, as to this aspect of the case, should remain undisturbed. See *Kramer* v. *Bd. of Adjust., Sea Girt*, 45 *N. J.* 268, 296-297 (1965).

We turn now to the broader issue addressed to the constitutional efficacy of the zoning ordinance as presently applicable to plaintiff's property. Preliminarily, we note that the trial judge properly ruled in favor of receiving evidence, *aliunde* the record before the board, bearing upon

that issue. Plaintiff's suit attacked not only the determination of the board, but also the constitutionality of the underlying zoning ordinance, an issue not raised before the board or within its jurisdiction to resolve. Note generally, *Dolan* v. *DeCapua*, 16 *N. J.* 599, 612-613 (1954); *Wilson* v. *Mountainside*, 42 *N. J.* 426, 441-442 (1964).

The supplemental proofs adduced in the Law Division proceedings included a master plan of the borough approved by the planning board in 1966 which, at the time of the trial, had not been officially adopted by the mayor and borough council. This exhibit, however, was admitted in evidence, with its pertinent land-use maps, to show current physical "make-up" conditions in the community and "'for statistical purposes only."

Plaintiff then testified that he had read all of the minutes of the board for the past 20 years and had compiled a list of variances granted during that period. The relevant information thus obtained was incorporated in a "Request for Admission Pursuant to Rule 4:26-1" (now *R.* 4:22-1), which, together with certain "Corrections" and the "Answer" of the municipal defendants, were accepted in evidence. These documents reveal that since 1948 over 60 variances had been granted to permit the conversion of single-family houses for two-family use.

Upon the foregoing premise plaintiff argues, in substance, that the division of the residential area of the municipality into one-family and two-family zoned districts, which have been permitted to become "more or less riddled substantially with one-family and two-family houses," negated *pro tanto* the intended zoning scheme of the borough and thereby rendered the rejection of his application for a variance a denial of due process and equal protection of the law.

We are cited to *Wilson* v. *Mountainside, supra,* for the proposition that "It is the antithesis of the statutory re-

quirement to impose blanket use restrictions without regard to the character of the district and use suitability and then generally and indiscriminately permit innumerable contrary uses by administrative action." 42 *N. J.*, at 443. *Cf. Katobimar Realty Co.* v. *Webster*, 20 *N. J.* 114, 123 (1955); *Rockhill* v. *Chesterfield Tp.*, 23 *N. J.* 117, 126 (1957). In essence plaintiff maintains that there is no integrity left to the one-family zoning in the borough, and it is both unreasonable and unconstitutional to continue such a district; particularly in the location of his property.

While at first blush there appears to be persuasive validity to plaintiff's contentions, we find upon deeper analysis of the record that the alleged merits are overcome by countervailing facts of paramount significance. Throughout the proceedings Ridge Road was characterized as a "wide thoroughfare." Under cross-examination plaintiff was asked:

> Q. How would you describe Ridge Road as an area, as a living area, in relation to the rest of the community? A. Well, it's a little older, the houses are bigger, there is more high trees than farther down the town. The street is a little wide, more buses on it. • • •
>
> Q. Would you agree or disagree that it is one of the finest residential areas in Rutherford? A. Yes, it is one of the finest in Rutherford.

Although apparently 60 residential conversion variances were allowed over a 20-year span, not a single variance was granted incident to a property on Ridge Road. It appears from one of the land-use map exhibits that this thoroughfare obliquely intersects Park Avenue and extends southward for approximately seven blocks to State Highway Route 3. The subject property is on the east side of Ridge Road, between Highland Cross and Summit Cross, in the third block from the Park Avenue intersection.

Appendix A

The trial judge noted in his oral opinion that there are 14 houses fronting Ridge Road, east and west side, between Highland Cross and Summit Cross, of which four are two-family dwellings existing as such prior to the municipal zoning. He then observed:

> • • •—there are a number of blocks that are still intact as single-family dwellings. Just to point out one or two, Block 112 is entirely single-family dwellings. That is three blocks south and two blocks west of the block in question, Block 124.
>
> If you go over to a block fronting on Orient Way, Block 140, we have a pure single-family dwelling block.
>
> Just two blocks south of the property in question, which is Block 122 fronting on Ridge Road, we have an entire block that is purely of single-family dwellings; and just to the south of that, Block 121, fronting on Ridge Road, we have a block that with the exception of one corner lot fronting on Sylvan Avenue (*sic*) and Van Riper Avenue, that is, that corner of Sylvan and Van Riper, except for that one plot that entire Block 121 is a single-family dwelling block.

It is plain that in certain sections of the R-1 district, particularly east of Ridge Road and the vincinity of Sylvan Street, a narrower street where all structures appear to be situated on 50′ x 100′ lots, the combination of pre-existing uses and grants for two-family housing variances have virtually destroyed the integrity of the single-family zoned planning as to that area of the district. It does not follow, however, that the validity of the entire single-family concept of the zoning ordinance must be condemned in toto, or as regards plaintiff's property located as it is on a prime residential artery leading directly to a single-family residential area virtually unintruded by two-family dwellings. Moreover, we note that the 1966 proposed master plan con-

templates that Ridge Road remain in a single-family residence zone.

As this court stated in *Birkfield Realty Co.* v. *Bd. Com's. of Orange,* 12 *N. J. Super.* 192 (App. Div.), certif. den. 8 *N. J.* 319 (1951):

> • • • The refusal by the governing body to permit still another encroachment to do violence to the existing zoning ordinance will not be viewed as arbitrary or capricious when, as here, grounded in a determination to adhere to and to further an approved and adopted zoning program essential to the larger plan for the physical development of the municipality and plainly designed and reasonably adapted to conserve and promote the public health, safety, morals and general welfare of the city.

The presumption of validity that attaches to a zoning ordinance is not overcome unless the proofs clearly show that the ordinance is arbitrary or unreasonable. *Fanale* v. *Hasbrouck Heights,* 26 *N. J.* 320, 327 (1958). See also 8 *McQuillin, Municipal Corporations* (3d ed. rev. 1965), § 25.60, at 149. *Cf. Vickers* v. *Tp. Com. of Gloucester Tp.,* 37 *N. J.* 232, 242 (1962), appeal dismissed and *cert.* den. 371 371 *U. S.* 233, 83 *S. Ct.* 326, 9 *L. Ed.* 2d 495 (1963).

We agree with the findings and conclusion of the Law Division that the evidence proffered by plaintiff was insufficient to support his contention that the borough zoning ordinance was unconstitutional as to the whole residential district or as applied to his property.

Affirmed.

APPENDIX B

SUPREME COURT OF NEW JERSEY

C-7 September Term 1970

CARL E. RING, Plaintiff-Petitioner,	)	
vs.	)	On Petition for Certification
MAYOR AND COUNCIL OF THE BOROUGH OF RUTHERFORD,	)	
Defendants-Respondents.	)	

To Appellate Division, Superior Court:

A petition for certification having been submitted to this Court, and the Court having considered the same,

It is hereupon Ordered that the petition for certification is denied, with costs.

WITNESS the Honorable Joseph Weintraub, Chief Justice, at Trenton on the 24th day of September, 1970.

/s/ JOHN H. GILDEA,
Clerk of the Supreme Court.

APPENDIX C

Part of Rutherford Zoning Ordinance

ARTICLE IV

RESIDENCE NUMBER 1 DISTRICTS

§ 131-5 USE REGULATIONS

In a Residence No. 1 District, no building or land shall be used, and no building or other structure shall be built, altered or erected to be used, for any purpose other than that of:

A. Dwellings
Dwellings for one (1) family or for one (1) housekeeping unit only.

ARTICLE V

RESIDENCE NUMBER 2 DISTRICTS

§ 131-7 USE REGULATIONS

In a Residence No. 2 District, no building or land shall be used, and no building or other structure shall be built, altered or erected to be used, for any purpose other than that of:

A. A dwelling, detached, or semidetached for not more than two (2) families nor more than two (2) housekeeping units.

B. Two (2) houses may be built semidetached on one (1) or more lots, provided however, that they are built at the same time with a common party wall.

C. A use permitted in a Residence No. 1 District.

Appendix C

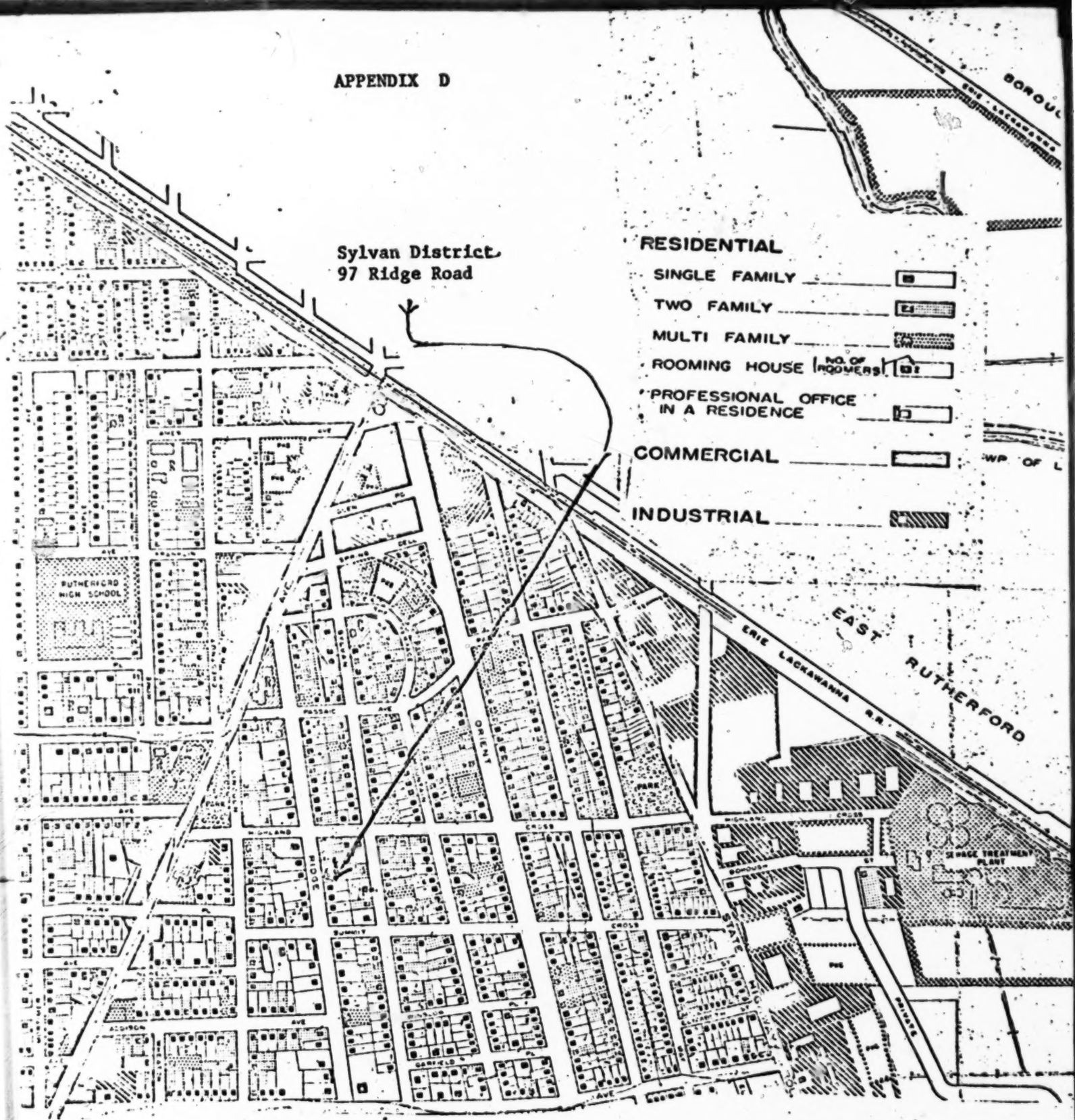
There are other use provisions in No. 1 Districts including professional offices; buildings for veterans organizations, community centers, municipal buildings, schools, churches, but these uses are also permitted in resident districts and in residence No. 2 districts in view of Section 131-7 C above.

There are also provisions of the height and bulk of buildings, front, back and side yards, building area, garages and sub-divisions, but these are identical for both districts.

APPENDIX D

(See opposite ☞)

APPENDIX D



EXISTING LAND USE

OCTOBER 1965

PREPARED FOR

RUTHERFORD PLANNING BOARD

by

Passaic Valley Citizens Planning Association